

Apr 01, 2019
UNITED STATES DISTRICT COURT
SEAN F. McAVOY, CLERK

EASTERN DISTRICT OF WASHINGTON

BRIAN H.¹

Plaintiff,

vs.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 4:18-cv-05052-MKD

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 15, 16

Before the Court are the parties' cross-motions for summary judgment. ECF

Nos. 15, 16. The parties consented to proceed before a magistrate judge. ECF No.

7. The Court, having reviewed the administrative record and the parties' briefing,

is fully informed. For the reasons discussed below, the Court grants Plaintiff's

motion, ECF No. 15, and denies Defendant's motion, ECF No. 16.

¹ To protect the privacy of plaintiffs in social security cases, the undersigned
identifies them only by their first names and the initial of their last names.

JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. § 1383(c)(3).

STANDARD OF REVIEW

4 A district court’s review of a final decision of the Commissioner of Social
5 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
6 limited; the Commissioner’s decision will be disturbed “only if it is not supported
7 by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153,
8 1158 (9th Cir. 2012). “Substantial evidence” means “relevant evidence that a
9 reasonable mind might accept as adequate to support a conclusion.” *Id.* at 1159
10 (quotation and citation omitted). Stated differently, substantial evidence equates to
11 “more than a mere scintilla[,] but less than a preponderance.” *Id.* (quotation and
12 citation omitted). In determining whether the standard has been satisfied, a
13 reviewing court must consider the entire record as a whole rather than searching
14 for supporting evidence in isolation. *Id.*

15 In reviewing a denial of benefits, a district court may not substitute its
16 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,
17 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one
18 rational interpretation, [the court] must uphold the ALJ’s findings if they are
19 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674
20 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an

1 ALJ’s decision on account of an error that is harmless.” *Id.* An error is harmless
2 “where it is inconsequential to the [ALJ’s] ultimate nondisability determination.”
3 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ’s
4 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
5 *Sanders*, 556 U.S. 396, 409-10 (2009).

6 **FIVE-STEP EVALUATION PROCESS**

7 A claimant must satisfy two conditions to be considered “disabled” within
8 the meaning of the Social Security Act. First, the claimant must be “unable to
9 engage in any substantial gainful activity by reason of any medically determinable
10 physical or mental impairment which can be expected to result in death or which
11 has lasted or can be expected to last for a continuous period of not less than twelve
12 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be
13 “of such severity that he is not only unable to do his previous work[,] but cannot,
14 considering his age, education, and work experience, engage in any other kind of
15 substantial gainful work which exists in the national economy.” 42 U.S.C. §
16 1382c(a)(3)(B).

17 The Commissioner has established a five-step sequential analysis to
18 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §
19 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s work
20 activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in “substantial

1 gainful activity,” the Commissioner must find that the claimant is not disabled. 20
2 C.F.R. § 416.920(b).

3 If the claimant is not engaged in substantial gainful activity, the analysis
4 proceeds to step two. At this step, the Commissioner considers the severity of the
5 claimant’s impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from
6 “any impairment or combination of impairments which significantly limits [his]
7 physical or mental ability to do basic work activities,” the analysis proceeds to step
8 three. 20 C.F.R. § 416.920(c). If the claimant’s impairment does not satisfy this
9 severity threshold, however, the Commissioner must find that the claimant is not
10 disabled. 20 C.F.R. § 416.920(c).

11 At step three, the Commissioner compares the claimant’s impairment to
12 severe impairments recognized by the Commissioner to be so severe as to preclude
13 a person from engaging in substantial gainful activity. 20 C.F.R. §
14 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the
15 enumerated impairments, the Commissioner must find the claimant disabled and
16 award benefits. 20 C.F.R. § 416.920(d).

17 If the severity of the claimant’s impairment does not meet or exceed the
18 severity of the enumerated impairments, the Commissioner must pause to assess
19 the claimant’s “residual functional capacity.” Residual functional capacity (RFC),
20 defined generally as the claimant’s ability to perform physical and mental work

1 activities on a sustained basis despite his limitations, 20 C.F.R. § 416.945(a)(1), is
2 relevant to both the fourth and fifth steps of the analysis.

3 At step four, the Commissioner considers whether, in view of the claimant's
4 RFC, the claimant is capable of performing work that he has performed in the past
5 (past relevant work). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is capable of
6 performing past relevant work, the Commissioner must find that the claimant is not
7 disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of performing such
8 work, the analysis proceeds to step five.

9 At step five, the Commissioner considers whether, in view of the claimant's
10 RFC, the claimant is capable of performing other work in the national economy.
11 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner
12 must also consider vocational factors such as the claimant's age, education, and
13 past work experience. 20 C.F.R. § 416.920(a)(4)(v). If the claimant is capable of
14 adjusting to other work, the Commissioner must find that the claimant is not
15 disabled. 20 C.F.R. § 416.920(g)(1). If the claimant is not capable of adjusting to
16 other work, analysis concludes with a finding that the claimant is disabled and is
17 therefore entitled to benefits. 20 C.F.R. § 416.920(g)(1).

18 The claimant bears the burden of proof at steps one through four above.
19 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
20 step five, the burden shifts to the Commissioner to establish that 1) the claimant is

1 capable of performing other work; and 2) such work “exists in significant numbers
2 in the national economy.” 20 C.F.R. § 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d
3 386, 389 (9th Cir. 2012).

4 **ALJ’S FINDINGS**

5 On November 26, 2013, Plaintiff applied for Title XVI supplemental
6 security income benefits, Tr. 151-59, alleging an amended disability onset date of
7 May 1, 2013, Tr. 43. The application was denied initially, Tr. 90-93, and on
8 reconsideration, Tr. 99-104. Plaintiff appeared before an administrative law judge
9 (ALJ) on August 3, 2016. Tr. 34-66. On December 23, 2016, the ALJ denied
10 Plaintiff’s claim. Tr. 15-33.

11 At step one of the sequential evaluation process, the ALJ found Plaintiff has
12 not engaged in substantial gainful activity since November 26, 2013. Tr. 20. At
13 step two, the ALJ found Plaintiff has the following severe impairments: post-
14 traumatic stress disorder (PTSD), depression, and fetal alcohol syndrome. Tr. 21.

15 At step three, the ALJ found Plaintiff does not have an impairment or
16 combination of impairments that meets or medically equals the severity of a listed
17 impairment. Tr. 21. The ALJ then concluded that Plaintiff has the RFC to perform
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1 a full range of work at all exertional levels, with the following nonexertional
2 limitations:

3 [Plaintiff] can perform simple, routine, repetitive tasks. He can
4 perform work with no contact with the general public. He can work
with consistent, workplace procedures.

5 Tr. 22-23.

6 At step four, the ALJ found Plaintiff does not have any past relevant work.
7 Tr. 27. At step five, the ALJ found that, considering Plaintiff's age, education,
8 work experience, RFC, and testimony from the vocational expert, there were jobs
9 that existed in significant numbers in the national economy that Plaintiff could
10 perform, such as, industrial cleaner, kitchen helper, and laundry worker II. Tr. 28.
11 Therefore, the ALJ concluded Plaintiff was not under a disability, as defined in the
12 Social Security Act, from November 26, 2013, the date the application was filed, to
13 the date of the ALJ's decision. Tr. 28.

14 On January 16, 2018, the Appeals Council denied review of the ALJ's
15 decision, Tr. 1-7, making the ALJ's decision the Commissioner's final decision for
16 purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

17 **ISSUES**

18 Plaintiff seeks judicial review of the Commissioner's final decision denying
19 him supplemental security income benefits under Title XVI of the Social Security
20 Act. Plaintiff raises the following issues for review:

1. Whether the ALJ properly evaluated the medical opinion evidence; and
2. Whether the ALJ properly evaluated Plaintiff's symptom claims.

ECF No. 15 at 5-20.

DISCUSSION

A. Medical Opinion Evidence

Plaintiff contends the ALJ improperly discounted the opinions of Philip Barnard, Ph.D.; Carina Bauer, Psy.D.; and Daniel Neims, Psy.D. ECF No. 15 at 15-20.

There are three types of physicians: "(1) those who treat the claimant (treating physicians); (2) those who examine but do not treat the claimant (examining physicians); and (3) those who neither examine nor treat the claimant [but who review the claimant's file] (nonexamining [or reviewing] physicians)."

Holohan v. Massanari, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (citations omitted).

14 Generally, a treating physician’s opinion carries more weight than an examining
15 physician’s opinion, and an examining physician’s opinion carries more weight
16 than a reviewing physician’s opinion. *Id.* at 1202. “In addition, the regulations
17 give more weight to opinions that are explained than to those that are not, and to
18 the opinions of specialists concerning matters relating to their specialty over that of
19 nonspecialists.” *Id.* (citations omitted).

1 If a treating or examining physician’s opinion is uncontradicted, the ALJ
2 may reject it only by offering “clear and convincing reasons that are supported by
3 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
4 “However, the ALJ need not accept the opinion of any physician, including a
5 treating physician, if that opinion is brief, conclusory, and inadequately supported
6 by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
7 (9th Cir. 2009) (internal quotation marks and brackets omitted). “If a treating or
8 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ
9 may only reject it by providing specific and legitimate reasons that are supported
10 by substantial evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester v. Chater*, 81
11 F.3d 821, 830–31 (9th Cir. 1995)). The opinion of a nonexamining physician may
12 serve as substantial evidence if it is supported by other independent evidence in the
13 record. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995).

14 1. *Dr. Bauer*

15 In April 2014, Dr. Bauer conducted a psychological evaluation and
16 diagnosed Plaintiff with unspecified depressive disorder (not enough criteria to
17 meet full major depressive disorder or bipolar disorder), posttraumatic stress
18 disorder, and fetal alcohol syndrome. Tr. 311-16. Dr. Bauer opined that Plaintiff
19 1) is able to perform simple and repetitive tasks, interact with coworkers and the
20 public, maintain regular attendance in the workplace and complete a

1 workday/workweek without interruption from a psychiatric condition, manage
2 usual stress when encountered in the workplace, and manage tasks once they are
3 mastered but is likely to struggle with new and novel tasks as well as tasks that are
4 complicated and require multiple steps; 2) has mild difficulty managing his own
5 funds and performing detailed and complex tasks; and 3) has moderate difficulty
6 accepting instructions from supervisors and working on activities on a consistent
7 basis without special or additional instructions. Tr. 315-16.

8 The ALJ gave varying amounts of weight—significant weight, partial
9 weight, and some weight—to various opinions rendered by Dr. Bauer. Tr. 26. To
10 the extent that Dr. Bauer's opinion was inconsistent with the nonexamining
11 opinions of Richard Borton, Ph.D. and Eugene Kester, M.D.,² Tr. 71-76, 83-87, the
12 ALJ was required to provide specific and legitimate reasons for discounting Dr.
13 Bauer's opinion. *See Bayliss*, 427 F.3d at 1216.

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16 ² Dr. Borton and Dr. Kester agreed with Dr. Bauer that Plaintiff could perform
17 simple and repetitive tasks and was limited in his abilities to understand,
18 remember, and carry out detailed instructions and sustain ordinary routine without
19 special supervision—but otherwise these doctors reached different opinions as to
20 Plaintiff's abilities than Dr. Bauer. Tr. 73-76, 86-87, 315-16.

1 Plaintiff does not challenge the ALJ’s decisions to 1) give significant weight
2 to Dr. Bauer’s opinion that Plaintiff retains the mental RFC to perform simple and
3 repetitive tasks and 2) discount Dr. Bauer’s opinion that Plaintiff is able to interact
4 with the public and has mild difficulty with detailed and complex tasks. ECF No.
5 15 at 18-19; ECF No. 19 at 8-9; Tr. 25.

6 Plaintiff challenges only the ALJ’s decision to give partial weight to Dr.
7 Bauer’s opinion that Plaintiff had moderate difficulty consistently working on
8 activities without special/additional instructions and/or supervision. Tr. 26; ECF
9 No. 15 at 18. An ALJ may reject limitations “unsupported by the record as a
10 whole.” *Batson v. Comm’r Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2003).
11 In support of this rejection, the ALJ stated that, contrary to Dr. Bauer’s opinion,
12 Plaintiff “can at most work with consistent, workplace procedures.” Tr. 26. The
13 ALJ provided no basis to support this conclusory statement. The ALJ failed to
14 address that Dr. Bauer found that Plaintiff’s fetal alcohol syndrome impacted his
15 ability to learn new tasks and therefore his learning period would be longer and he
16 would require additional and continued instruction from a supervisor. Tr. 316.
17 Absent any discussion of Dr. Bauer’s findings and opinion in regard to how
18 Plaintiff’s fetal alcohol syndrome impacts his ability to work, the Court is unable
19 to meaningfully review whether the ALJ’s interpretation of the evidence is
20 rational. *See Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir. 2015); *Embrey*

1 *v. Bowen*, 849 F.2d 418, 421–22 (9th Cir. 1988) (requiring the ALJ to identify the
2 evidence supporting the found conflict to permit the Court to meaningfully review
3 the ALJ’s finding); *Reddick*, 157 F.3d 715, 725 (9th Cir. 1998) (“The ALJ must do
4 more than state conclusions. He must set forth his own interpretations and explain
5 why they, rather than the doctors’ [opinions] are correct.”). This error is
6 consequential because the vocational expert testified that an individual who needs
7 redirection to the extent he is off-task more than ten percent of the workweek is not
8 capable of being gainfully employed on a sustained basis. Tr. 61-63.

9 2. *Dr. Barnard*

10 In June 2015, Dr. Barnard psychologically evaluated Plaintiff and diagnosed
11 Plaintiff with generalized anxiety disorder, borderline intellectual functioning, and
12 other specified bipolar and related disorder (short duration, hypomanic episodes,
13 and major depressive episodes). Tr. 358-62. Dr. Barnard opined that Plaintiff was
14 1) severely limited in his abilities to perform activities within a schedule, maintain
15 regular attendance, be punctual within customary tolerances without special
16 supervision, maintain appropriate behavior in a work setting, and complete a
17 normal workday and workweek without interruptions from psychologically based
18 symptoms; 2) markedly limited in his abilities to understand, remember, and
19 persist in tasks by following detailed instructions and communicate and perform
20 effectively in a work setting; and 3) moderately limited in his abilities to learn new

1 tasks, perform routine tasks without special supervision, adapt to changes in a
2 routine work setting, make simple work-related decisions, be aware of normal
3 hazards and take appropriate precautions, ask simple questions or request
4 assistance, set realistic goals, plan independently, and understand, remember, and
5 persist in tasks by following very short and simple instructions. Tr. 360-61.

6 The ALJ gave little weight to Dr. Barnard's opinion. Tr. 26. To the extent
7 that Dr. Barnard's opinion was inconsistent with the nonexamining opinions of
8 Richard Borton, Ph.D. and Eugene Kester, M.D.,³ the ALJ was required to provide
9 specific and legitimate reasons for discounting Dr. Barnard's opinion. *See Bayliss*,
10 427 F.3d at 1216.

11 Initially, Plaintiff contends that the ALJ erred because of her references to
12 Plaintiff's criminal history. ECF No. 15 at 17. Here, the ALJ highlighted that Dr.
13 Barnard recognized that Plaintiff was a registered sex offender, which is a
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15 ³ The opinion conflicts with those of Dr. Borton and Dr. Kester, who assessed
16 moderate as opposed to marked limitations in Plaintiff's abilities to understand,
17 remember, and carry out detailed instructions; maintain attention and concentration
18 for extended periods; sustain ordinary routine without special supervision; interact
19 appropriately with the public; respond appropriately to work-setting changes; and
20 set realistic goals or make plans independently of others. Tr. 73-76, 86-87.

1 substantial, non-disability related barrier to finding work. Tr. 26 (citing Tr. 361).
2 Contrary to Plaintiff's assertion otherwise, the ALJ did not discount Dr. Barnard's
3 opinion because Plaintiff had a criminal conviction. Tr. 26. Instead, the ALJ
4 discounted Dr. Barnard's opinion for the following two reasons.

5 First, the ALJ discounted Dr. Barnard's opinion because it was more heavily
6 based on Plaintiff's subjective allegations than the medical evidence. Tr. 26 (citing
7 Tr. 358-62). A physician's opinion may be rejected if it based on a claimant's
8 properly discounted complaints. *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th
9 Cir. 2001); *Morgan v. Comm'r of Soc. Sec Admin.*, 169 F.3d 595, 602 (9th Cir.
10 1999). However, when an opinion is not more heavily based on a patient's
11 discounted self-reports than on clinical observations, there is no evidentiary basis
12 for rejecting the opinion. *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014);
13 *Ryan v. Comm'r of Soc. Sec. Admin.*, 528 F.3d 1194, 1199-200 (9th Cir. 2008).
14 Because this matter is being remanded for reconsideration of both the medical
15 evidence and Plaintiff's subjective complaints, on remand, the ALJ should
16 reconsider this medical opinion as well. The Court observes that the ALJ noted
17 that Dr. Barnard did not review other evidence but rather based his opinion on
18 Plaintiff's lengthy self-reports, which the ALJ found inconsistent with the medical
19 evidence. Tr. 26. The ALJ noted that Dr. Barnard's two-page summary of
20 Plaintiff's personal narrative in his report is evidence that Dr. Barnard heavily

1 based his opinion on Plaintiff's self-reports. Tr. 26. Here, Dr. Barnard also
2 conducted a mental status exam, in which Dr. Barnard found that Plaintiff's
3 thought process and content, perception, memory, fund of knowledge,
4 concentration, abstract thought, and insight and judgment were not within normal
5 limits. Tr. 362. Even if the Court were to accept that Dr. Barnard's report lacked
6 sufficient objective support and relied too heavily on Plaintiff's self-reports, the
7 ALJ failed to adequately justify her rejection of Dr. Barnard's opinion. "To say
8 that medical opinions are not supported by sufficient objective findings . . . does
9 not achieve the level of specificity [the Ninth Circuit's] prior cases have
10 required. . . . The ALJ must do more than offer [her] conclusions. [She] must set
11 forth [her] own interpretations and explain why they, rather than the doctors', are
12 correct." *Embrey*, 849 F.2d at 421–22. Given the abnormal mental status
13 evaluation findings, which the ALJ did not discuss, the ALJ failed to adequately
14 justify her rejection of Dr. Barnard's opinion.

15 Second, the ALJ discounted Dr. Barnard's opinion because a full-scale IQ
16 (FSIQ) of 79 does not by itself support a diagnosis of borderline intellectual
17 functioning but instead supports the RFC for simple, routine, and repetitive tasks.
18 Tr. 26 (citing Tr. 362). A medical opinion may be rejected if it is unsupported by
19 medical findings. *Bray*, 554 F.3d at 1228; *Batson*, 359 F.3d at 1195. Here, the
20 ALJ conclusory stated that the FSIQ of 79 did not by itself support a diagnosis of

1 borderline intellectual functioning (BIF), but rather supported the ALJ's RFC.
2 Here, the record reflects that Plaintiff's learning abilities were limited as a child.
3 *See, e.g.*, Tr. 48, 289, 359, 509 (Plaintiff had an Individualized Education Program
4 (IEP) plan in school and was in special-needs classes). Accordingly, without
5 additional analysis of Dr. Barnard's observations and abnormal mental status
6 evaluation findings, the Court is unable to meaningfully review this offered reason
7 for discounting Dr. Barnard's opinion. *See Brown-Hunter*, 806 F.3d at 492;
8 *Regennitter v. Comm'r of Soc. Sec. Admin.*, 166 F.3d 1294, 1299 (9th Cir. 1999)
9 ("[C]onclusory reasons will not justify an ALJ's rejection of a medical opinion."');
10 *Embrey*, 849 F.2d at 421-22; *Rohan v. Chater*, 98 F.3d 966, 970 (7th Cir. 1996).

11 By failing to meaningfully articulate a specific and legitimate reason,
12 supported by substantial evidence, for discounting Dr. Barnard's opinion, the ALJ
13 erred. This error is consequential because the RFC did not contain additional
14 limitations consistent with Dr. Barnard's opinion—limitations, which could
15 preclude sustained gainful work if credited. *See Stubbs-Danielson v. Astrue*, 539
16 F.3d 1169, 1174 (9th Cir. 2008).

17 3. *Dr. Neims*

18 In June 2015, Dr. Neims reviewed the medical evidence and found that the
19 severity and functional limitations in the identified medical reports were generally
20 consistent with the evidence but that Dr. Barnard's borderline intellectual

1 functioning opinion did not appear to be based on generated testing. Tr. 509-10.
2 Dr. Neims recommended testing Plaintiff's adult IQ and further testing to clarify
3 Plaintiff's Axis I diagnosis. Tr. 509-10. Dr. Neims stated the:

4 [t]wo most recent acceptable psychological evaluations opined
5 sufficient duration to meet [Washington state's Aged, Blind, or
6 Disabled (ABD)] criteria and generally identify similar diagnostic
7 formulations. Earlier psychological evaluations question the
possibility of fetal alcohol syndrome, and ideally specialized
assessment regarding these issues via University of Washington might
be secured to aid with case development.

8 Tr. 510.

9 The ALJ assigned little weight to Dr. Neims' opinion. Tr. 26. Because Dr.
10 Neims' opinion was inconsistent with the nonexamining opinions of Richard
11 Borton, Ph.D. and Eugene Kester, M.D., Tr. 71-76, 83-87, the ALJ was required to
12 provide specific and legitimate reasons for discounting Dr. Neims' opinion. *See*
13 *Bayliss*, 427 F.3d at 1216.

14 First, the ALJ discounted Dr. Neims' opinion pursuant to 20 C.F.R. §
15 416.904, because Dr. Neims completed the opinion for Washington State
16 Department of Social and Health Services (DSHS) disability benefits' purposes.
17 Tr. 26 (citing Tr. 509-10). Although § 416.904 provides that a state disability
18 decision is not binding on the Commissioner, a blanket rejection of a DSHS
19 opinion is contrary to the Social Security requirements to evaluate each medical
20 source opinion and consider the supporting evidence underlying the State agency

1 decision. 20 C.F.R. §§ 416.913(a), 416.927(b), (c). Here, the ALJ failed to
2 consider and address the supporting evidence underlying Dr. Neims' decision,
3 particularly since three of the cited medical reports relied on by Dr. Neims—Eric
4 Thomas, LMHC's April 29, 2015 medical report, Dr. Brian VanFossen's June 20,
5 2014 Review of Medical Evidence opinion, and Dr. Moon's June 24, 2014
6 psychological assessment—are not part of the Administrative Record, ECF No. 11.
7 Moreover, the ALJ did not evaluate how Washington state's DSHS requirements
8 differ from the Social Security disability requirements, of particular importance
9 given that WAC 182-512-0050 relies on the Social Security five-step analytic
10 framework. *See Holbrook v. Berryhill*, No. 15-35552, 696 Fed. App'x 846 (9th
11 Cir. Aug. 30, 2017) (unpublished opinion) (reversing the ALJ for failing to
12 adequately consider a Washington DSHS decision finding the claimant disabled).
13 While there may be situations where less weight should be assigned to a medical
14 opinion obtained for DSHS purposes based on the differences in agency
15 requirements or given the relied-on medical evidence, the ALJ failed to articulate
16 any analysis here. On this record, simply because Dr. Neims completed the
17 opinion for Washington state-issued benefits' purposes was not a specific and
18 legitimate reason for rejecting Dr. Neims' opinion.

19 Second, the ALJ discounted Dr. Neims' opinion because he based his
20 opinion on only a portion of the evidence. Tr. 26. Relevant factors to evaluating

1 any medical opinion include the amount of relevant evidence that supports the
2 opinion and the consistency of the medical opinion with the record as a whole.
3 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1042 (9th Cir. 2007); *Orn v. Astrue*, 495
4 F.3d 625, 631 (9th Cir. 2007). Here, the scope of the medical evidence reviewed
5 by Dr. Neims is unclear. However, his report indicates that at a minimum he
6 reviewed: 1) Dr. Barnard’s June 3, 2015 opinion, Tr. 358-62; 2) a Catholic Family
7 and Child Services’ May 19, 2015 psychiatric evaluation conducted by Kishore
8 Varada, PA-C, Tr. 354-57; 3) Eric Thomas, LMHC’s April 29, 2015 medical
9 report; 4) Dr. VanFossen’s June 20, 2014 Review of Medical Evidence opinion;
10 and 5) Dr. Moon’s June 24, 2014 psychological assessment.⁴ Tr. 509. Based on
11 his reference to Dr. Moon’s psychological assessment, which is not listed under
12 “Medical Reports,” it appears that Dr. Neims reviewed more than those documents
13 listed under “Medical Reports.” Moreover, Dr. Neims reviewed and considered
14 Dr. Barnard’s opinion and records from Catholic Family and Child Services—
15 records that were not available when Dr. Borton and Dr. Kester conducted their
16 nonexamining reviews in 2014. On this record, it was not a legitimate and
17 specific reason to discount Dr. Neims’ opinion because it was based on a purported

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19 ⁴ The opinions of Mr. Thomas, Dr. Moon, and Dr. VanFossen are not included in
20 the Administrative Record, ECF No. 11.

1 partial review of the medical evidence, while at the same time giving significant
2 weight to portions of Dr. Borton's and Dr. Kester's 2014 opinions.

3 In summary, Plaintiff established the ALJ failed to articulate specific and
4 legitimate reasons, supported by substantial evidence, for her weighing of the
5 medical opinions. The error is not harmless because had these opinions about
6 Plaintiff's need for additional instruction and special supervision been credited,
7 Plaintiff may be considered disabled given the vocational expert's testimony that
8 an individual requiring redirection more than ten-percent of the workweek is not
9 capable of sustained gainful employment. Tr. 61-63.

10 **B. Plaintiff's Symptom Claims**

11 Plaintiff contends the ALJ failed to rely on clear and convincing reasons in
12 discrediting his symptom claims. ECF No. 15 at 5-15. Because the analysis of this
13 issue is in part dependent on the ALJ's evaluation of the medical evidence, the
14 Court declines to address these challenges here. However, the Court briefly
15 addresses the following. First, if the ALJ is to discount Plaintiff's claims of
16 disabling pain on the grounds that Plaintiff cared for his grandfather, the record
17 must identify the nature, scope, and duration of the care involved. *See Trevizo v.*
18 *Berryhill*, 871 F.3d 664, 675-76 (9th Cir. 2017). Second, if the ALJ is to discount
19 Plaintiff's testimony because he sought to start a lawn care business, the ALJ must
20 be mindful that a claimant has not engaged in substantial gainful activity if he is

1 unable to hold a job for a significant period of time. *See Gatliff v. Comm'r of Soc.*
2 *Sec. Admin.*, 172 F.3d 690, 692-94 (9th Cir. 1999). Finally, if the ALJ is to
3 discount Plaintiff's testimony because of improvement or noncompliance with
4 treatment, the ALJ must be mindful that medical findings must be read in the
5 context of the overall diagnostic picture and that good cause for failure to follow or
6 seek treatment must be considered. *Orn*, 495 F.3d at 638; *Holohan*, 246 F.3d at
7 1205.

8 **C. Remedy**

9 Plaintiff urges this Court to remand for an immediate award of benefits.
10 ECF No. 15 at 20; ECF No. 19 at 10.

11 “The decision whether to remand a case for additional evidence, or simply to
12 award benefits is within the discretion of the court.” *Sprague v. Bowen*, 812 F.2d
13 1226, 1232 (9th Cir. 1987) (citing *Stone v. Heckler*, 761 F.2d 530 (9th Cir. 1985)).
14 When the Court reverses an ALJ’s decision for error, the Court “ordinarily must
15 remand to the agency for further proceedings.” *Leon v. Berryhill*, 880 F.3d 1041,
16 1045 (9th Cir. 2017); *Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090,
17 1099, 1101 (9th Cir. 2014) (“Where there is conflicting evidence, and not all
18 essential factual issues have been resolved, a remand for an award of benefits is
19 inappropriate.”). However, the Ninth Circuit has “stated or implied that it would
20 be an abuse of discretion for a district court not to remand for an award of

1 benefits" when three credit-as-true conditions are met. *Garrison v. Colvin*, 759
2 F.3d 995, 1020 (9th Cir. 2014). Under the credit-as-true rule, the court may
3 remand for an award of benefits if 1) the record has been fully developed and
4 further administrative proceedings would serve no useful purpose; 2) the ALJ
5 failed to provide legally sufficient reasons for rejecting evidence, whether claimant
6 testimony or medical opinion; and 3) if the improperly discredited evidence were
7 credited as true, the ALJ would be required to find the claimant disabled on
8 remand. *Revels v. Berryhill*, 874 F.3d 648, 668 (9th Cir. 2017).

9 On this record, further proceedings are necessary to properly evaluate the
10 medical opinion evidence, including consultation with a medical expert in regard
11 to Plaintiff's Axis I diagnoses and whether Plaintiff's fetal alcohol syndrome
12 impacts his intellectual and psychological functioning as an adult. In addition,
13 given Dr. Neims' reference to three opinions that were not included in this
14 administrative record, the ALJ is to assess whether the record should be
15 supplemented with any additional opinions, including: Mr. Thomas's April 29,
16 2015 medical report; 2) Dr. VanFossen's June 20, 2014 Review of Medical
17 Evidence opinion; and 3) Dr. Moon's June 24, 2014 psychological assessment.
18 Therefore, this case is remanded for further proceedings. The ALJ is instructed to
19 determine whether the record needs to be further developed, take testimony from a
20

1 medical expert, reweigh the medical evidence, reweigh Plaintiff's symptom
2 allegations, and conduct a new sequential analysis.

3 **CONCLUSION**

4 Having reviewed the record and the ALJ's findings, the Court concludes the
5 ALJ's decision is neither supported by substantial evidence nor free of harmful
6 legal error. Accordingly, **IT IS HEREBY ORDERED:**

7 1. Plaintiff's Motion for Summary Judgment, **ECF No. 15**, is **GRANTED**.

8 2. Defendant's Motion for Summary Judgment, **ECF No. 16**, is **DENIED**.

9 3. The Clerk's Office shall enter **JUDGMENT** in favor of Plaintiff

10 REVERSING and REMANDING the matter to the Commissioner of Social

11 Security for further proceedings consistent with this recommendation pursuant to

12 sentence four of 42 U.S.C. § 405(g).

13 The District Court Executive is directed to file this Order, provide copies to
14 counsel, and **CLOSE THE FILE**.

15 DATED April 1, 2019.

16 *s/Mary K. Dimke*
17 MARY K. DIMKE
18 UNITED STATES MAGISTRATE JUDGE
19
20